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No.———

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

GEORGE W. ARMSTRONG, SR., ET AL,
Petitioners,

vs.

SEABOARD SURETY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

George W. Armstrong, Sr., Mary C. Armstrong, Allen J. Armstrong and George W. Armstrong, Jr., petitioners, pray that a writ of certorari issue to review the decree of the Court of Civil Appeals for the 5th Circuit entered on December 6, 1946, rehearing overruled January 13, 1947, affirming the decree of the District Court of the United States for the Northern District of Texas entered on January 12, 1946, in a suit styled Seaboard Surety Company, plaintiff v. George W. Armstrong, Sr., et al, Defendants, No. 748 CIVIL.

OPINION BELOW

The opinion of the court below filed December 6, 1946, has not been reported but is a part of the Record page 140.

BASIS OF JURISDICTION

Jurisdiction is invoked under Sec. 240(a) of the Judicial Code as amended by the Acts of February 13, 1925, 43 Stat. 398 (28 U. S. C. A. Sec. 347) and under Supreme Court Rule No. 38, Sec. 5, Sub. Div. b. The grounds for jurisdiction which will be hereinafter more fully stated under that head is based upon the claim that the Circuit Court of Appeals, as well as the District Court, failed to apply the applicable federal rules and the applicable state law and that the decision herein as applied to the facts is in conflict with numerous federal cases and state decisions hereinafter more specifically set forth under the heading referred to.

QUESTIONS PRESENTED

The controlling questions presented in this petition are:

1. Whether, after the entry of a declaratory judgment in favor of the plaintiff in the District Court, that court erred in entering a further judgment in the same case granting coercive relief to the plaintiff by rendering judgment on certain note, the validity of which was involved in said suit for declaratory judg-

ment after appeal was perfected and while the same was pending, and based solely on said declaratory judgment contrary to the ordinary rule that where an appeal is pending from a judgment of a trial court, that court is without jurisdiction to proceed further in said cause until said appeal has been determined.

2. Whether the trial court erred in rendering judgment against petitioners, guarantors of the debts of the Texasteel Manufacturing Company, a corporation, which debt was represented by notes sued upon without having previously or at the same time rendering judgment against said corporation the principal debtor without either pleading or proof that said corporation was insolvent or beyond the jurisdiction of the court.

3. Whether the Circuit Court of Appeals erred in holding that the petitioners were primary obligors on said notes and, therefore suable as principal without the joinder of said corporation the principal debtor.

4. Whether the trial court erred in rendering judgment against petitioners on said notes pending the proceeding for reorganization of said Texasteel Manufacturing Company filed by Respondent and without pleading or proof that a claim had been filed by respondent for said indebtedness in said reorganization proceedings.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The appeal in this case is from a judgment in the companion case in which application for certiorari has been filed and which were argued together and one opinion rendered for both by the Circuit Court of Appeals. The companion case being No. 11,499, Texasteel Manufacturing Company, et al, Appellants, v. Seaboard Surety Company, Appellee. The appeal in the instant case in the Circuit Court of Appeals was No. 11,603 styled George W. Armstrong, Sr., et al, Appellants v. Seaboard Surety Company, Appellee.

After the judgment of May 2, 1945, in Cause No. 11,499 in the Circuit Court of Appeals and while the appeal, from the judgment in said cause which was styled in the lower court Seaboard Surety Company v. Goerge W. Armstrong, et al, No. 748 CIVIL, was pending in the Circuit Court of Appeals respondent filed a petition in the same cause praying for a judgment against petitioners for the principal, interest and attorney fees on certain notes as follows:

A note payable to Continental National Bank, dated December 8, 1943, for the sum of $350,000.00, with interest from date at the rate of five per cent per annum, and providing for attorney fees of ten per cent of the principal and interest due, and signed by Texasteel Manufacturing Company by Allen J. Armstrong, President, with a written guarantee on the back thereof signed by George W. Armstrong, George W. Armstrong, Jr., and Allen J. Armstrong.

A second note for the sum of $100,000.00, dated March 1, 1944, payable to said bank and signed by George W. Armstrong, Jr., with a written guarantee on the back thereof signed by George W. Armstrong.

A third note for the sum of 100,000.00, dated March 1, 1944, payable to said bank and signed by Allen J. Armstrong with a written guarantee on the back thereof signed by George W. Armstrong.

All of said notes were indorsed without recourse by the Continental National Bank to Respondent. (R. 61, 62, 63, 64, 65, 66).

Respondent's sole claim for judgment for the amount of said notes, principal, interest and attorney's fee was based on said declaratory judgment. (R. 2, 4, 5 and 14).

Petitioners moved to dismiss said petition on the ground that the court was without jurisdiction, in that an appeal was pending from said declaratory judgment and that the trial court was without jurisdiction to enforce it while said appeal was pending; further pleaded that petitioners were sureties on said note and not liable otherwise, and that it would be inequitable and unjust to enter judgment against them with award of an execution during the pendency of reorganization proceedings filed by respondent in which a trustee for the property of the said corporation had been appointed and was then engaged in managing the affairs and administering the properties of said company; that said company was a go-

ing concern and its assets exceeded the total amount of its indebtedness. (R. 24, 25). Subject to said motion petitioner pleaded that pendency of the appeal from the declaratory judgment and that as to the obligations sued upon, petitioners were accommodation sureties. (R. 26, 27). The trial court overruled the motion to dismiss and held that the declaratory judgment was res adjudicata and that respondents were entitled to the relief prayed for based upon the declaratory judgment of May 2, 1945, and rendered judgment against the petitioners last hereinabove named for the principal, interest and attorney fees of said note. The decree against George W. Armstrong, Allen J. Armstrong and George W. Armstrong, Jr., was for the sum of $397,031.25, with interest on said note of $350,000.00, and against George W. Armstrong and Allen J. Armstrong for the sum of $113,437.50 with interest, and against George W. Armstrong and George W. Armstrong, Jr., for an additional sum of $113,437.50, with interest. (R. 110, 111). It was stipulated that an appeal was pending from said declaratory judgment of May 2, 1945, at the time of the said decree (R. 37). The judgment on January 12, 1946, was rendered solely on said declaratory judgment. The court filed conclusions of fact and law in which it found that the judgment rendered on May 2, 1945, and on appeal in said Cause No. 11,499, was res adjudicata and that the judgment so entered on January 12, 1946, was based solely on said judgment. (R. 122, 123). The sole ground for said monetary judgment claimed by respondent was that it was entitled to enforce the declaratory decree entered on May 2, 1945. (R. 2).

The prayer of the petitioner for coercive relief and for a show cause order was based wholly on said declaratory judgment. (R. 14). Respondents offered in evidence the application signed by petitioner for a surety bond dated December 8, 1943, and this instrument was an application by Texasteel Manufacturing Company, of Fort Worth, Texas, for a bond in the sum of $350,000.00 to date from December 3, 1943. The nature and character of bond is described as loan guarantee and paragraph two, thereof, recites that the "undersigned will at all times indemnify and keep indemnified the surety and save it harmless by reason of having executed the said bond referred to," and this application is signed by Texasteel Manufacturing Company, Allen J. Armstrong, indemnitor, and then George W. Armstrong and George W. Armstrong, Jr. (R. 68, 69, 70 and 71). Similar applications for two other bonds, each in the sum of $100,000.00.

REASONS FOR GRANTING THIS WRIT

The holding of the Circuit Court of Appeals that the granting of the money judgment in the case after the rendition of declaratory judgment was not error is in conflict with numerous decisions of other circuits and of this court, declaring the rule to be that an appeal from the final judgment vested in the appellate court jurisdiction in the case and divested the trial court of all other jurisdiction with reference to the judgment rendered, so long as appeal is pending. The rule as stated is taken from the opinion *In Re Allen*, 115 F. 2d 936. It was held in *U. S. v. Southern*

Pacific Ry. Co. 20 F. 2d 529 that the above rule has been uniformly followed and applied to judgments of Federal Court. in Civil Cases.

In *U. S. v. Radice*, 40 F. 2d 445, the rule stated:

> "But we are not at liberty to consider the merits of the District Court's ruling because the record discloses that the court was without jurisdiction to allow intervention at the time the order was entered on November 18, 1929. The decree of forfeiture was made June 24, 1929, and on the same day an appeal was allowed to the lessee. Citation on appeal issued September 5th, the record was filed in this court October 20th, and the appeal was argued November 6th. The perfecting of that appeal transferred all jurisdiction of this court, and thereafter, during pendency of that appeal, the court below was without power to vacate or modify its decree of forfeiture."

In *4 C.J.S. 605, 606, 607*, pages 1089-1091, the rule is stated as shown above and numerous cases of this court and other Circuit Courts of Appeal are cited which are listed in the margin:

3 Am. Jur., p. 192, section 528;
3 C. J., section 1369, p. 1255;
Berman v. U. S., 302 U. S. 211, 214; 82 L. Ed. 204;
Midland, etc. Ry. Co. v. Warinner, 294 F. 185;
Heitmuller v. Stokes, 256 U. S. 359, 65 L. Ed. 990;
Keyser v. Farr, 105 U. S. 265, 26 L. Ed. 1025;
Rothschild v. Marshall, 51 F. 2d 897;
Ex Parte Travis (Tex. Sup.) 123 Tex. 480, 73 S. W. 2d 487;

Doehler Metal Furniture Co. v. Warren, 129 F. 2d 43;
St. L. & S. F. Ry. Co. v. Loughmiller, 193 F. 689;
Ensminger v. Powers, 108 U. S. 292, 27 L. Ed. 732;
Jackson v. Finance Corporation, 41 F. 2d 103 (cert. denied, 75 L. Ed. 754);
Suncrest Lumber Co. v. North Carolina Park Commission, 30 F. 2d 121;
Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237;
Dickinson v. Rinke, 132 F. 2d 884;
Shaw v. Payne, 254 U. S. 609, 65 L. Ed. 436;
U. S. v. Radice, 40 F. 2d 445;
Berman v. Wreck-A-Pair Bldg. Co., 182 Sou. 54 (Ala.).

The fact that the judgment appealed from was not superseded does not affect the application of the rule. The matter of supersedeas becomes material only when the point considered is the enforcement of the judgment according to its term. A judgment may be enforced according to its terms when not superseded. If the court had awarded any kind of writ for the enforcement of the declaratory judgment, an appeal by cost bond only would have prompted the issuance and service of such writs and the enforcement of the judgment as provided for in the decree. This is beside the point. In this case, the decree was a declaratory judgment only, no coercive relief was asked or granted and the instant proceeding was for the sole purpose of obtaining a judgment based on the declaratory judgment of May 2, 1945, while the ap-

peal was pending. The monetary judgment rendered was entered in the same cause and by a pleading which was in effect a motion for coercive relief, and upon the pleading being presented to the court had issued a show cause order. The point is not whether the judgment appealed from is superseded but the question is the power of the court to exercise jurisdiction in the same case after a final judgment rendered by him while an appeal from such judgment is pending and undecided.

Unless a rule exists concerning declaratory judgment, which differs from the ordinary rule with respect to judgments of Federal Courts in civil cases generally, the trial court was without jurisdiction to entertain the petition and render the judgment of January 12, 1946.

No case has been cited by respondent and none was referred to in the per curim opinion of the Circuit Court of Appeals deciding this question in favor of the action of the Court below. In *Sinclair Ref. Co. v. Burris,* 133 F. 2d 536, it was said that a declaratory judgment only fixes the rights of the parties, which rights may be enforced in a separate suit. In Borchards "Declaratory Judgments," page 255, it is further stated that the ordinary rules apply to an appeal from a declaratory judgment.

In numerous cases it has been stated that *Section 400, Title 28, U.S.C.A.* does not add to the jurisdiction of the Federal Courts nor does it change the essential requisites of the jurisdiction of Federal Courts.

Agnew v. Hoague, 99 F. 2d 349; *Miles Laboratories v. Federal Trade Commission*, 140 F. 2d 683. It is submitted that the question has never been decided in favor of the action of the trial court, and that it is of such importance that the holding of the Circuit Court of Appeals, contrary to the general rule, should be reviewed.

The holding of the Circuit Court of Appeals that petitioners were primarily liable on the obligation, for which recovery was allowed, is contrary to the decisions of the Supreme Court of Texas in the case of *Wood v. Canfield Paper Co.*, 117 Tex. 399; and the applicable Texas Statutes being *Arts. 1986, 1987 and 6251 Revised Statutes*, which Statutes are shown in Appendix B to supporting brief.

The opinion recognizes the rule declared by said statutes, which provides, in substance, that no judgment should be rendered against a party not primarily liable on a note or other contract, unless judgment be also rendered against the principal obligor, except where the principal obligor can not be reached, by the ordinary process of law, or his residence unknown, and can not be ascertained by the use of reasonable diligence, or is actually or notoriously insolvent. The error in the holding of the Circuit Court of Appeals is in the fact that petitiners were primarily liable. The grounds for this holding are not stated. The contract evidencing the liability of George W. Armstrong was written on the back of each of the three notes above referred

to, and by this recital, all the liability therein imposed was strictly that of a guarantor. *Guaranty Etc. v. Singleton*, (Tex. Civ. App.), 85 S. W. 2d 803; *Wood v. Canfield Paper Co.*, 117 Tex. 399. The contention of respondent in the Circuit Court was that because the notes contained a recitation that all signers and indorsers thereof are to be regarded as principals (R. 61), and because petitioners signed the application for surety bonds above referred to, that this constituted them indemnitors and, therefore, primarily liable. The contract signed by George W. Armstrong was a separate contract and not part of the note itself. *Eller v. Irvin*, 265 S. W. 595. The undertaking was to guarantee the payment of the within instrument at maturity, and waive protest and notice of sale. This was a contract of guaranty. *Guaranty Etc. v. Singleton*, 85 S. W. 2d 803 did not render said Armstrong liable as an indorser. *Wood v. Canfield Paper Co.*, 117 Tex. 399; *Central Trust Co. v. Manley* (5 cir.) 100 F. 2d 993. The suit of respondent, and on which judgment was rendered in its favor, was not on an indemnity contract, and the said application referred to above related not to the notes, but to a bond which respondents executed as sureties for Texasteel Manufacturing Company. The judgment against petitioners was for the principal, interest and attorney fees stipulated in the notes, and by respondents as the owner of such notes. The judgment could not have been rendered under the proof on an indemnity contract. In such a case recovery would only have been allowed

for the amount of attorneys fees actually paid or contracted to be paid. *First State Bank v. Wallace*, 165 S. W. 595; *U. S. Fidelity & Guaranty Co. v. Paulk*, 155 S. W. 2d 100. There was neither pleading nor proof that the corporation was insolvent. Insolvency under said articles of Texas Statutes above referred to, means that the principal debtor has no assets of a substantial amount which may be used even as a part payment on such debt. *Smith v. Oberjohns*, 93 Tex. 35; 53 S. W. 341. In fact the proof in the record, was only that said corporation had assets exceeding its debt, and that said corporation had a net worth of $570,000.00. (R. 105, 106).

No presumption of insolvency can be indulged from the filing and approval of the reorganization petition, because if a corporation is absolutely insolvent, the petition for reorganization would not be approved. *In Re Ware Metal Polish Co.*, 42 F. Supp. 538.

It has been frequently declared by Texas decisions, that where payee in a note knows that one of the signers of a note is the surety for another, the creditor must have due regard for his rights as a surety, even though the suretyship does not appear on the face of the instrument. *Lubbock First Natl. Bank v. Alexander*, 4 S. W. 2298; *Victoria etc. Bank v. Skidmore*, 30 S. W. 564.

WHEREFORE petitioners tender herewith a record of the proceedings in the trial Court and in the Circuit Court of Appeals as required by the Supreme Court Rule 38, and respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the 5th Circuit Court of Appeals, commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record, and of the proceedings of said United States Circuit Court of Appeals, 5th Circuit, and in the case numbered on its docket as No. 11,603, styled George W. Armstrong Sr., et al, Appellants v. Seaboard Surety Company appellee, to the end that the judgment in said case may be reviewed and determined by this court, and as provided for by the Statutes of the United States and the rules of this court, and that the said judgment of the United States Circuit Court of Appeals, 5th Circuit, in the cause referred to be reversed

with appropriate direction of this court, and for such further relief as to this court may seem proper.

Dated at Fort Worth, Texas, this the —— day of March, A. D., 1947.

GEORGE W. ARMSTRONG
MARY C. ARMSTRONG
ALLEN J. ARMSTRONG
GEORGE W. ARMSTRONG JR.,
Petitioners.

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Of Counsel

No. ———

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

GEORGE W. ARMSTRONG, SR., ET AL,
Petitioners,

vs.

SEABOARD SURETY COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the 5th Circuit, in said cause styled George W. Armstrong, Sr., et al, appellants v. Seaboard Surety Company, appellee, No. 11,603, is not yet reported in the Federal Reports but may be found in the records filed in this suit R. 140.

II.

JURISDICTION

This has been stated under "Basis of Jurisdiction" and "Reasons for Granting the Writ" in the preceeding petition for writ of certiorari to which reference is here made and, therefore, will not be repeated here.

III.

STATEMENT OF THE CASE

The case has already been stated in the preceeding petition for writ of certiorari on page 4 which statement is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the rendition of monetary judgment awarding execution against petitioner for the amount of the principal, interest and attorney fees of said notes sued on and said judgment being wholly based on the declaratory judgment and entered while an appeal from said declaratory judgment was pending was not in error.

2. The Circuit Court of Appeals erred in affirming the judgment of the trial court entered after the rendition of the declaratory judgment and in the same case while an appeal from said declaratory judgment was then pending.

3. The Trial Court was without jurisdiction to proceed further in the case in which said declaratory judgment was rendered while an appeal from said declaratory judgment was pending.

4. The Court of Civil Appeals erred in holding that petitioners were primarily liable on the notes for which judgment was rendered against them, and that

it was not error for the trial court to render judgment against petitioners for the full amount of said notes without having previously, or at the same time, rendered judgment against Texasteel Manufacturing Company, the principal debtor, without either allegation or proof that said corporation was insolvent, or beyond the jurisdiction of the court.

5. The Circuit Court of Appeals erred in affirming the judgment of the trial court against the petitioners on the obligation sued on, pending the proceedings for reorganization of Texasteel Manufacturing Company, in which said corporation was involved; said proceedings being filed by respondent, without exhausting the assets of the principal debtor before rendering judgment against petitioners.

V.

ARGUMENT AND AUTHORITIES

Three points are presented by the foregoing assignment:

1. The first is that the trial court was without jurisdiction to render judgment against petitioners on the notes sued on and based solely on said declaratory judgment while an appeal from said declaratory judgment was pending:

2. And the Second point is the error of the trial court in rendering judgment against petitioners who were guarantors of said notes without having previ-

ously, or at the same time, rendered judgment against the principal debtor, said corporation, without either pleading or proof that said corporation was either insolvent or beyond the jurisdiction of the court.

3. That the jurisdiction of the bankruptcy court is exclusive.

The first and third points are governed by the Federal decisions, and the second point is a question of State Law. There is no dispute in the facts. The declaratory judgment was rendered as shown above on May 2, 1945, and an appeal taken therefrom, and while said appeal was pending a petition, or motion, was filed in the same cause by respondents, and based solely on said declaratory judgment, for a judgment and execution on the notes sued on, the validity of which was involved in said proceedings for a declaratory judgment. The judgment against the petitioners on such notes was based upon the assignment of said notes, without recourse to respondent, by the Continental National Bank and the liability of George W. Armstrong, Sr., for the amount of said notes is based upon a written guaranty on the back of each of said notes; and the liability of Allen J. Armstrong, for the note signed by George W. Armstrong, Sr., is based upon a similar guaranty; and the liability of George W. Armstrong, Jr., for the note signed by Allen J. Armstrong is based upon a like guaranty. (R. 61-64). The record shows that said corporation was involved in reorganization proceedings still pending. (R. 123).

The opinion of the Circuit Court of Appeals decided all points adversely to petitioners. The opinion of the Circuit Court of Appeals is contrary to, and definitely in conflict with, the prevailing rule in the Federal Court, on the first and third points and contrary to, and definitely in conflict with, the Acts of the Texas Legislature as shown by Appendix "B" to this brief, and the decisions of the state courts construing and applying said Statutes.

FIRST POINT IN ARGUMENT: The rule as to the lack of jurisdiction by a District Court to proceed further in a case after judgment, and while an appeal therefrom is pending, is well established and the authorities collated on page 8 of the preceeding petition for certiorari. As shown in the preceeding petition for writ, the established rule is that an appeal from a final judgment vests in the appellate court jurisdiction of the case, and divests the trial court of all other jurisdiction with reference to the judgment rendered, so long as the appeal is pending. The decisions of this court and numerous Circuit Courts of Appeal have applied this rule to many different orders entered in cases after judgment and while appeal is pending therefrom. There is no decision inconsistent with the rule as stated.

Respondents argued in the Circuit Court of Appeals that the rule was not applicable because the Federal Courts hold that a judgment though appealed from is res adjudicata between the parties until reversed. This argument begs the question. The point is not that

the judgment is res adjudicata between the parties until reversed, but the point is the power of the court to render another judgment in the same case while appeal from a final judgment is pending.

The second judgment was in effect a proceeding whereby an execution was awarded on a cause of action determined in the first judgment and which execution was not awarded as a part of the first judgment. The case of *Sinclair Refining Co. v. Burris*, 133 F. 2d 536, is the only case, so far as petitioners are advised, in which the specific question has been even remotely discussed. In that case it was stated that a declaratory judgment only fixes the rights of the parties, which rights may be enforced in a separate suit. The reasonable inference from this holding is that the proceeding to enforce the declaratory judgment must wait until that judgment becomes final. It has been held that the ordinary rule as to judgments will apply to an appeal from a declaratory judgment. *Borchard's "Declaratory Judgments"* page 255.

Numerous cases hold that *Section 400, Title 28 U.S.C.A.*, did not add to the jurisdiction of the Federal Courts, nor does it change the essential requisites of Federal Jurisdiction. *Agnew & Co. v. Hoague*, 99 F. 2d 349; *Miles Laboratories v. Fed. Trade Commission*, 140 F. 2d 683.

It is respectfully submitted that the trial court was without jurisdiction to enter the judgment of

January 12, 1946, pending the appeal from said declaratory judgment.

SECOND POINT IN ARGUMENT: Respondents alleged that petitioners were guarantors. (R. 3). The notes upon which judgment was rendered, disclosed that petitioners liability for said notes was contained in a guaranty contract written on the back of each of said notes. (R. 61 to 66). The collateral agreement executed at the same time, pledged the stock of said corporation owned by petitioners, recites that the notes are guaranteed by George W. Armstrong Sr. (R. 67). The application for surety bonds does not refer to said notes, but only to said bonds to be executed by respondent as guarantor, and indemnifies respondent from losses by reason of having signed said bonds. No contracts of indemnity to respondents for the payment of said notes is anywhere shown. The record in the declaratory proceeding shows that all parties understood the undertaking of Geo. W. Armstrong to that of a Guarantor. P. 20 accompanying Petition Texasteel Manufacturing Co. The record conclusively shows that judgment was rendered against petitioners by virtue of their contract of guaranty, written on the back of said notes. Petitioners were sureties for the Texasteel Manufacturing Company to respondents. The judgment against petitioners was not sought, nor rendered against them, as indemnitors. If it had, the judgment would have been confined to the amount paid or incurred by respondent as surety for said manufacturing company. *First State Bank v. Wallace*, 165 S. W. 595; *Eller v. Irving*, 265 S. W. 595;

U. S. Fidelity & Guaranty Co. v. Paulk, 155 S. W. 2d 100. As shown by the authorities cited in the preceeding petition, the contract of guaranty is a separate and independent contract; that George W. Armstrong Sr. was not a signer nor indorser of either of said notes, therefore, the provision that indorser or signer shall be liable is not applicable to him. This is also true as to the liability of Allen J. Armstrong on the $100,000.00, note signed by George W. Armstrong, and as to liability of George W. Armstrong for the $100,000.00 note, signed by Allen J. Armstrong; that said contract was one of guaranty is decided in the following cases: *Guaranty Etc. v. Singleton* (Tex. Civ. App.) 85 S. W. 2d 803; *Central Trust Company v. Manley* (5th Cir.) 100 F. 2d 993; *Woods v. Canfield Paper Co.*, 117 Tex. 399; *Sidwell v. First National Bank of Colorado*, 233 Pac. 153, 154.

The jurisdiction in this case, depends on diversity of citizenship, and the Texas Statutes shown in the appendix are applicable. *Erie v. Tompkins*, 304 U. S. 64; *Huddleston v. Dwyer*, 322 U. S. 232; *Guaranty Trust Co. v. York*, 326 U. S. 99.

Prior to the decision in *Woods v. Canfield Paper Co.*, 117 Tex. 397, the Texas Court of Civil Appeals had held that where the guaranty involved was unconditional, the above statutes did not apply. These holdings were in fact overruled in *Wood v. Canfield Paper Company*. This case has been consistently followed and the law there declared had not been questioned since the rendition of that decision.

The Texas Statutes are applicable here. It is shown by the records in the first suit, that petitioners signed said note at the request of respondent, who was in charge of the operations at Port Arthur, and who desired these loans to be made in order to finance said operations. (R. 98-99). Attention is called to the decree in *In Re Kelly Springfield Tire Company*, Tex. 10 Fed. Supp. 414, *Hastings v. Byers*, 40 N. Y. S. 2d 299; affirmed 57 N. N. E. 2d 733; Cert. denied 324 U. S. 860; that the approval of the petition of reorganization, and the appointment of Trustee, was not an adjudication of insolvency as that term is used, and has been defined, by the Supreme Court of Texas. *Smith v. Oberjohns*, 93 Tex. 55.

THIRD POINT: This point has been argued under specification of errors one and two in companion appeal Texasteel Mfg. Co. v. Seaboard Surety Co., p. 21. Supporting Brief pp. 53-56.

CONCLUSION

Petitioner respectfully submits that the Circuit Court of Appeals was in error in holding that the trial court is justified to render judgment against petitioner in the same case, after final judgment for which an appeal is pending, and further erred in

holding that petitioners were primary obligors on the notes in question, and could be sued and judgment rendered against them, without the presence of the principal debtor, and without a showing of want of jurisdiction of the principal debtor, or is solvent, and that the Texas Statute shown in the appendix was not applicable.

WHEREFORE petitioner prays that the judgment of the Circuit Court of Appeals and the trial court be reviewed for further proceeding in accordance with the opinion of this court.

Respectfully submitted,

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APPENDIX B

ART. 1986

The acceptor of a bill of exchange, or a principal obligor in a contract may be sued either alone or jointly with any other party who may be liable thereon; but no judgment shall be rendered against a party not primarily liable on such bill or other contract, unless judgment be also rendered against such acceptor or other principal obligor, except where the plaintiff may discontinue his suit against such principal obligor as hereinafter provided.

ART. 1987

The assignor, indorser, guarantor and surety upon a contract, and the drawer of a bill which has been accepted, may be sued without suing the maker, acceptor or other principal obligor, when the principal obligor resides beyond the limits of the State, or where he cannot be reached by the ordinary process of law, or when his residence is unknown and cannot be ascertained by the use of reasonable diligence, or when he is dead, or actually or notoriously insolvent.

ART. 6251

No surety shall be sued, unless his principal is joined with him, or unless a judgment has previously been rendered against his principal, except in the cases otherwise provided for in the laws relating to parties to suits.